

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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BRIEF FOR APPELLEE

**In the United States Court of Appeals for the
District of Columbia**

No. 8127

ARTHUR HAMMOND, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

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UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellant was convicted in the lower court under an indictment charging him with an assault with intent to commit rape. The errors assigned all relate to the refusal of the court to direct a verdict in favor of the appellant at the close of the Government's case (Appellant's App. 7 and 9). The substantial evidence relied upon by the Government in opposition to the motion for a directed verdict and in support of the Government's right to have the case submitted to the jury was that the complaining witness, Margaret Lewis, on the date of the alleged offense between the hours of 2:00 and 3:00 o'clock in the morning, was in her room in bed asleep, when someone entered her room, pulled the cover off her and placed his hand upon her private parts; that the person committing these acts was the appellant, Arthur Hammond, and that the commission of the acts awakened her; whereupon, she screamed and ran into her mother's room. While there was other evi-

dence, some of which would tend to corroborate the testimony of the complaining witness and some of which might tend to affect her credibility or the probability of her story, it is conceded that the elements of the offense must be found in the above condensed statement of the evidence.

STATUTES INVOLVED

Appellant has set out on page 2 of his brief Section 28, Title 6, of the D. C. CODE (1929); Section 805 of the CODE (1901). This was apparently inadvertent since there is a specific section of the CODE dealing with assaults with intent to kill, to commit rape, etc., under which the prosecution was brought. This statute, Section 803 of the CODE (1901), Section 26, Title 6, D. C. CODE (1929), Section 501, Title 22, D. C. CODE (1940):

Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

SUMMARY OF ARGUMENT

The offense charged consists of two elements: (1) The assault by the defendant upon the complainant, and (2) the specific intent to rape existing in the mind of the defendant at the time of the perpetration of the assault. Concededly, the intent to rape consists of an intent to have connection with a female by force and against her consent. The evidence in this case is sufficient as to both elements of the offense charged. The unauthorized touching of the person of the complainant in the manner disclosed by the record constitutes an assault, and, indeed, it has not been contended that there was no assault in this case. With respect to the other element of the offense charged, that is the intent to rape, the circumstances disclosed in the evidence are sufficient to justify the submission to the jury of the question of the existence of the intent to rape. These circumstances are: The time and place of the assault and the manner in which it was perpetrated.

In such cases as this, the intent with which the assault is committed is a fact which can only be inferred from the outward act and the surrounding circumstances and is, therefore, a question of fact for the jury, rather than of law for the court. The fact that the person charged desisted before consummation of his object does not relieve him of guilt.

ARGUMENT

In his statement of points at page 3 of his brief, appellant in point 2 specifies for argument that the court committed error in ruling that no force or resistance was necessary to show a specific intent to commit the offense charged. Counsel for the Government did not understand that any such ruling was made or that such ruling was contemplated within the errors assigned. Nor is such a statement consistent with the ultimate and penultimate paragraphs of the bill of exceptions (Appellant's App. 7) nor with the assignment of errors (Appellant's App. 9). Accordingly, the case will be argued herein upon the theory that appellant complains of the court's action in overruling the motion for directed verdict made at the close of the Government's case, and upon the ground that the evidence was not sufficient to show the existence of the specific intent required as an element of the offense charged. Since an assault has been shown by the evidence the intention with which such assault was committed is a fact which can only be inferred from the surrounding circumstances and from the overt act of the defendant. *People v. Jones*, 112 Cal. App. 68, 296 Pac. 317. The surrounding circumstances here are that an assault was made upon the person of the complaining witness. The assault was made between the hours of 2:00 and 3:00 o'clock in the morning; the assault took place in the bedroom of the complaining witness and after the appellant, who had no right to be in the room occupied by the complaining witness, had removed the bedclothes from the person of the complaining witness, who was asleep. While under other circumstances a mere touching of the private parts of a female might not constitute an assault with intent to rape, the circumstances surrounding the assault here are such that from them the jury

may infer the existence of the specific intent required in the offense charged. And where there is evidence tending to prove that the intent was as alleged in the indictment, the question is one of fact and a verdict should not be set aside on the ground that the evidence is insufficient. *People v. Estrada*, 53 Cal. 600.

In the case of *Bell v. State*, 36 Ga. App. 111, 135 S. E. 521, there was an almost identical question presented upon almost identical facts and the court held that the evidence was sufficient to support the verdict. In that case the evidence disclosed that the defendant was on the bed beside the complaining witness, who was asleep; that the defendant put his arm around her neck, and placed his hand upon her person under her clothes. At that point the complaining witness awoke, screamed or called to her husband who was in the same room, and that thereupon the defendant jumped up and ran from the house. This case is particularly persuasive because of its remarkable similarity to the case presented here. There as here, the assault consisted of the unauthorized touching of the person of the complaining witness; there as here, the touching was at most placing of the defendant's hands upon the person of the complaining witness; there as here, the assault was perpetrated in the bedroom at night; there as here, others were present in the room where the assault was perpetrated at the time of its perpetration; there as here, there was some evidence that the defendant was under the influence of intoxicants; there as here, the defendant desisted and fled upon an outcry being made.

In the case of *Richardson v. State*, 23 Ala. App. 260, 123 So. 283, the defendant, a colored porter, was charged with an assault upon a white woman passenger on a pullman sleeping car, and speaking of the necessity of finding the requisite intent to commit rape, the court said:

And as in all cases where the intent raises the act to the gravity of a felony, such intent being the state of mind and not susceptible of direct proof must of necessity be the result of inferences to be drawn from all the facts and circumstances in the immediate case then being tried.

Other cases where on similar or comparable facts, the court has held that the evidence sustained the conviction of an assault with intent to commit rape are: *Selby v. State*, 112 Tex. Cr. R. 42, 13 S. W. (2d) 838, where it appeared that the prosecutrix was a young white woman who habitually passed on her way from work a certain place, and that on the occasion in question the defendant stopped her, threw his arm around her neck, threw her to the ground and choked her and beat her in the head, but did desist when an automobile drove up throwing lights in his face; during the attack nothing was said which would throw any light on his performance, nor did the defendant make any effort to raise the prosecutrix' clothing; *Jones v. State*, 46 Ga. App. 679, 169 S. E. 46, where it appeared that the complaining witness upon hearing that the defendant, a Negro, was in the house where her mother was, went to the house accompanied by a friend; there the defendant grabbed her saying, "Come here"; whereupon, she screamed and started to run, the defendant then grabbed her and was trying to pull her into a back room, when she broke away and ran; *Brittian v. State*, 41 Ga. App. 577, 153 S. E. 622, where it appeared that a sixteen-year-old white girl, while walking on the street at night was approached by a colored boy who asked her name, where she lived, then pointed a pistol at her and ordered her to go into a vacant lot, telling her that he would shoot her heart out if she did not go and would shoot her if she hollered; *Cutts v. State*, 172 Ark. 1176, 288 S. W. 883, in which it appeared that the defendant approached the complaining witness, a girl twelve years of age, while she and her companion were gathering flowers; that he grabbed her around the body and with his other hand felt over her body to her private parts and tore her underclothes; that she struck him in the face with a bunch of flowers and told him to leave her alone, whereupon he ran away; *State v. Pinkard*, 318 Mo. 751, 300 S. W. 748, in which it appeared the defendant was the father of the prosecuting witness, and on the occasion in question she was in bed asleep, clothed with a nightgown; that she was awakened by feeling defendant's hands upon her private parts; that he was up over her and had his knees on the bed and that

after she kicked him away they had some conversation in the nature of solicitation on the part of the defendant.

There are numerous cases to the effect that the intent requisite to the establishment of the offense may be inferred from the acts of the person charged with the crime, even though he voluntarily desists prior to consummating his unlawful purpose. The force used need be of no specific degree or character, nor need it be persisted in until the assailant's design is accomplished, but if the assault is actually begun and the intent can be gathered from the acts committed, the offense is complete notwithstanding the fact that the assailant may for some reason relent and forbear from the consummation of his purpose.

Morgan v. State, 189 Ark. 981, 76 S. W. (2d) 79;

Fowler v. State, 42 Okla. Cr. 300, 275 Pac. 655;

Jackson v. State, 117 Tex. Cr. R. 51, 35 S. W. (2d) 409;

People v. McKinnie, 328 Ill. 631, 160 N. E. 121;

Boyett v. State, 186 Ark. 815, 56 S. W. (2d) 182;

Begley v. State, 180 Ark. 267, 21 S. W. (2d) 172;

Ramirez v. State, 55 Ariz. 441, 103, P2, 459.

State v. Merricks, — Mo. —, 18 S. W. (2d) 23.

In the case last cited, the court reiterated the statement it had theretofore made to the effect that "if the intent, with the present means of carrying it into effect exists and preparations therefor have been made, the assault is complete."

Cases cited by the appellant are distinguishable in most instances and are not persuasive. Of the eight cases cited by the appellant on the question of sufficiency of the evidence in support of a conviction for assault with intent to commit rape, five of the cases involved assaults upon children of five or seven years of age. In one of them *Gilbert v. State*, 180 So. 306, the court does not disclose what the evidence in support of the conviction was, but does conclude that such evidence was sufficient to justify the conviction. Two of the cases: *Pew v. State*, 172 Miss. 885, 161 So. 678, and *Mungilla v. State*, 135 Tex. Cr. R. 287, 118 S. W. (2d) 598, would appear to give some support to the position taken by the appellant. However, in the *Pew*

case, the assault took place at 8:30 o'clock in the morning at a point near the business section in the City of Hattiesburg, and in the *Mungilla case* the assault took place at 4:00 in the afternoon in the presence of two companions of the complaining witness. It is submitted that both of these cases are distinguishable from the case at bar, where the assault took place in the night time, in the bedroom of the complaining witness and under circumstances which indicate that the intent of the appellant was to ravish.

CONCLUSION

The evidence in the case discloses that on the date charged in the indictment and between the hours of 2:00 and 3:00 o'clock of the morning of that day, the appellant made an assault upon the complaining witness by approaching the bed in which she was sleeping, by removing the covers from her and by placing his hand upon her private parts. The presence of the appellant in the bedroom of the complaining witness, a place where he had no right to be, the time of the night of the offense, and the acts which he committed are ample to justify the finding that the intent which he then entertained was the intent to rape. Neither the fact that the defendant might have been foolish in making his assault in a room in which others were, nor the fact that the sounding of the alarm caused him to abandon his project prior to accomplishment of his object, is sufficient to relieve him of responsibility since the evidence disclosed a question of fact for submission to the jury, and since there was substantial evidence to support a finding of the existence of intent to rape. The court properly overruled the motion for a directed verdict and its judgment should be affirmed.

Respectfully submitted.

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